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CHARLES ELMORE CR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

Reply Brief and Argument for Appellant.

IRWIN T. GILRUTH,
THOMAS C. McCONNELL,
231 South La Salle Street,
Chicago, Illinois.

OWEN RALL,
135 South La Salle Street,
Chicago, Illinois
Counsel for Appellant.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6521

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Answer to Appellee's Statement of the Case.

In appellee's brief an attempt is made to restate the case and make it appear that the coal involved in this controversy was not properly weighed. The record is clear that the coal was weighed in accordance with the State statutes regulating weights and measures in force at Morris, Illinois, where the weighing took place (Rec. 14, 18). A delivery ticket was furnished in accordance with these regulations by the Morris Coal and Mining Company (Rec. 11). The coal was sold through the efforts of Burgess, a broker or dealer for the Morris Coal & Mining Company, in Chicago (Rec. 19). The business involved is, as

stated in the appellant's brief, that of trucking coal direct from mine to consumer (Rec. 19, 20) and the fact that a broker or dealer takes the original order from the customer is immaterial for the reason that the coal does not come to rest in transit between mine and consumer. It is, of course, admitted that the ordinance complained of has been violated, and the whole point of appellant's argument is that since the ordinance is unconstitutional it need not be complied with.

While it is true, as stated on page 7 of appellee's brief, that there are no "complaining mining companies" as parties to this record, it must be apparent to the Court that this is a test case. The only way the constitutionality of this ordinance can be tried out in the courts is through contesting on the grounds assigned as error on this appeal, the arrests and prosecutions of the truckers carrying the coal. We submit that the record amply sustains the statement of facts which appears in appellant's brief.

ARGUMENT.

I.

The Purpose Sought to be Accomplished by the Ordinance.

We have already pointed out that the original purpose sought to be accomplished by this ordinance was to provide an original weighing of coal sold from coal yards which had been dumped as an indiscriminate mass in the yard (Appellant's Brief, p. 27). (*City of Chicago* v. *Wisconsin Lime & Cement Co.*, 312 Ill. 520.) The business here involved is a different business than that originally regulated by the ordinance. Neither the court below nor appellee's brief give any weight to the essential fact that the appellant's business to be regulated is now, because of nation wide changes in methods of transportation, an entirely different problem than operating a local coal yard.

The opinion below and the appellee both assume that because the regulation is reasonable as to a local coal yard, it is reasonable as applied to different facts.

This is contrary to *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, where in an opinion by Mr. Justice Brandeis this Court stated (p. 415) three rules applicable here:

> First—"A statute valid as to one set of facts may be invalid as to another."
>
> Second—"A statute valid when enacted may become invalid by change in the conditions to which it is applied."
>
> Third—"The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

That case involved allocation to railroads of the expense of highway grade separations and the Court recognized (p. 416) the recent "revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles." The case at bar presents another example of a regulation having become invalid and unreasonable because of that very change. Although it be true that our complaint arises out of a "method of transportation" which we have voluntarily adopted, yet that does not justify evasion of determining the reasonableness of the regulation here challenged *as applied to present conditions,* because the method of transportation is widespread, efficient, economically sound for hauls of the length involved here, and is perfectly lawful.

Although it held the ordinance to be reasonable, the Supreme Court of Illinois based its holding practically on the sole ground that since the regulation was reasonable as applied *to other facts* (*i. e.,* a local coal yard), it was also reasonable as applied to the different facts here presented. The appellee's brief falls into the same error and in addition erroneously argues that this court may not consider the reasonableness of the ordinance.

On page 14, appellee refers to the statement of the court below that the fact that the coal was weighed on State-tested scales is immaterial. That statement is true only if this ordinance be held valid, but, as we contended in our brief (pp. 23-24), it was error for the court below to *ignore* the fact of a previous weighing at the mine and to ignore the existence of other laws and ordinances *in determining whether this ordinance is valid as applied to the situation existing here.*

In appellee's argument under this heading a discussion is indulged concerning the practice of double weight tickets. We suggested in our brief (p. 18) that a delivery ticket

might be required without constitutional objection. The appellant's quarrel with this ordinance arises by virtue of the method of weighing required by the ordinance. If, as we suggested, the official tare weight might be obtained after dumping the coal at the customer's residence, this procedure would equally as well as the present ordinance protect the customer from padded or false weight tickets. The weighing itself could, as we pointed out, be done by a public weighmaster and the whole force of appellee's argument on double tickets would be as well met by the suggested reasonable procedure, as by the present unreasonable one. Our position is that it is clearly unnecessary to compel the dumping of a load in transit to protect a customer from the evils, fancied or real, which are suggested by the appellee and that in fact the weighing of the truck after delivery is no more subject to abuse than the method now required by the ordinance.

Since the customer must be furnished with a delivery ticket both under state statute and under city ordinance, irrespective of the city weighmaster's certificate, the "double ticket evil" would be as effectively prevented by obtaining the tare weight of the vehicle on the scales of the public weighmaster after the coal is unloaded at the residence of the purchaser, as it is if obtained before delivery to the purchaser. The only protection of the present ordinance against the double ticket scheme elaborated in appellee's brief is that the public weighmaster is bonded. His bond would be just as effective as an instrumentality of enforcing his honesty if the tare weight were obtained after the coal was unloaded at the premises of the purchaser as it is effective now in enforcing his honesty when the tare weight is to be obtained before loading the vehicle. Not a single one of the supposed evils which appellee refers to is any more likely to occur if the tare weight is obtained

after than if it is obtained before. Since the present ordinance is no better fitted to meet the evils than the method suggested by the dissenting judges of the Illinois Supreme Court, the appellee's argument that the burden imposed by the present ordinance of unloading the coal at the scales in order to obtain the tare weight before delivery is *necessary* to meet the evils which appellee parades in its brief, must fail.

On page 15, appellee contends that the state statute referred to in our original brief (p. 8) and set out in full in appellant's printed jurisdictional statement (p. 9), requiring a delivery ticket to be given to the purchaser, is ineffective to prevent "double tickets" because the ticket is not required to be given to the purchaser before removal of the coal from the truck. If that statute is inadequate to meet that problem as contended, the City of Chicago has effectively and sufficiently supplemented the statute by Section 3342 of the Revised Chicago Code of 1931 (Rec. 33-34) which requires this delivery ticket to be delivered to the purchaser "at the time of the delivery of the fuel *and before such fuel or any part thereof is removed from such vehicl*" This delivery ticket is *in addition* to the weighmaster's certificate required by Section 2947 (Rec. 29) involved in this appeal. In view of Section 3342 of the ordinance, the "double ticket" evil is as well met by having the *additional* weighmaster's certificate (containing the gross, tare and net weights of the load) delivered to the purchaser after unloading the coal and before payment, as before unloading the coal. Delivery of the delivery ticket before unloading meets the evil discussed; delivery also of a weighmaster's certificate at that time is unnecessary.

On page 16, appellee makes the startling argument that the latter portion of Section 3342 requiring a reweighing

of coal on demand, although contained in the 1931 revision of appellee's ordinances, is in truth unconstitutional and was held to be void in *City of Chicago* v. *Kautz,* 313 Ill. 196, decided in 1924. In the present case, however, the court below (at the insistence, incidentally, of the appellee—see its brief in the court below, Rec. 102) held (Rec. 48-49) that its holding in the *Kautz case* was limited to declaring void that part of a section (which is now Section 3342) which permitted a city inspector to require a reweighing of coal *that had been weighed by a public weighmaster.* That court has not held that the section is void as applied to coal coming into Chicago without being weighed on a public weighmaster's scale and our original contention still stands that the power given by Section 3342 to the customer and to the inspector of weights and measures to require a verification of the weight of a load of coal must be recognized in determining the reasonableness of requiring—as applied to our facts—the unloading of coal at the scales to obtain a verification of the mine weight. The appellee having re-enacted Section 3342 in 1931, although the *Kautz case* was decided in 1924, and having limited the *Kautz case* in the court below, ought not to be permitted here to stultify itself by arguing that the section is unconstitutional as applied to a situation not presented to the Illinois court in the *Kautz case.*

The statement at the bottom of page 16 of appellee's brief that if the ordinance now attacked be held unconstitutional "there will be nothing left in so far as truckers like Hauge are concerned but an empty prohibition of short weighing and a meaningless penalty" is nothing short of absurd. The power would remain to pass a reasonable ordinance to replace the unreasonable one here under review.

On page 17 of its brief, appellee says this Court may not "substitute its judgment for that of the municipal legisla-

tive body." The cases referred to later, cited under Point III of appellee's own brief, hold, contrary to this statement, that the reasonableness of a regulation enacted under the police power is subject to judicial review. If this were not true constitutional safeguards would be meaningless words without sanctions enforcing them.

In so far as the City honestly protests against false weights, we concur. There is no issue between us on that point. It is the fact that the method proposed to curb these dishonest practices imposes a burdensome and unnecessary charge upon the customer which the City ostensibly wishes to protect that brings our objection. In the instant case the city inspector did not attempt to weigh the load (Rec. 14). He knew the weights were right (Rec. 14). But by means of arresting the trucker on the charge of not having a weight certificate the City either imposes the burden of dumping and reloading the coal or prohibits the delivery of the coal. It is the technical weighing procedure necessary to obtain a weighmaster's certificate which constitutes the vice of the situation. Nor does the appellant complain about the requirement of a bond of $2,000, or the certifying of scales if he could be licensed as a public weighmaster at the point of original weighing, or even of the requirement that he be licensed as a public weighmaster in Chicago if a reasonable method of weighing were permitted that did not involve dumping the load and reloading before delivery to the customer.

II.

The Reasonableness of the Ordinance is Subject to Judicial Determination. The Ordinance is Unreasonable.

We have pointed out in our original brief (p. 17) that even though the object of a statute or ordinance be within

the police power the method used to accomplish the object must be necessary and reasonable.

Appellee, without meeting these cases squarely and without really arguing that the ordinance is reasonable, attempts to dodge the issue by citing twenty-four cases under Point II of its brief to the general effect that this Court may not concern itself with the wisdom of legislation. That is, of course, too clear for argument. Equally clear it is that when a regulation of a legitimate business, under the guise of the police power, is extravagantly unreasonable and is unnecessary, the Court will not hesitate to declare it void.

Appellee contends that our appeal is an effort to substitute our judgment for that of the City Council as to the kind of an ordinance which should govern truck shipments of coal into the City of Chicago. Not at all. We have pointed out the existence of reasonable methods of accomplishing the end *ostensibly* sought to be accomplished by the City only because the existence of such reasonable methods has a direct bearing on the important question whether the present harsh and burdensome regulation is *necessary*. Obviously, a regulation which is *of necessity* harsh may be justified constitutionally while at the same time a regulation could not be sustained which is harsh not of necessity but because of an *arbitrary* refusal to adopt less burdensome but equally effective alternatives. We and the dissenting justices of the court below contend that the ordinance involved here falls in the latter class and is invalid.

The suggestion of the dissenting justices permitting the weighing of the empty vehicle after delivery and our suggestions as to a method of weighing are referred to by appellee as a "suspicious syllogism" (Appellee's Brief,

p. 21). This statement is elaborated on by a further discussion on pages 22 to 24 of appellee's brief. If the arguments there presented are analyzed their specious nature is at once apparent.

Without indulging in conjecture as to the accuracy of the supposititious weights used by counsel for which there is no record basis, we wish to point out that all they have stated is that a dishonest trucker can by manipulation of various objects increase his tare weight. However, a tare weight including standard articles of permanent equipment can be stenciled on the truck, and if any of the equipment is taken off in transit from the mine to Chicago this would become apparent upon a weighing of the gross load, because the Chicago weight would not agree with the mine weight. There would be no incentive for the trucker to depart from his stenciled weight at the time of his mine weighing because he is paying the mine for the difference between his stenciled tare weight and the gross amount of his load. If he decreases his tare weight he obviously pays for more coal than he actually receives. His every interest on his original weighing at the mine would be to insure that his tare weight did not vary from the stencil shown on his truck, because he is charged for the difference between the tare and the gross weights. Now, if after having a weighing he desires to short weight his customer, he can do it as easily in Chicago after leaving a Chicago coal yard as he can between Morris and Chicago. *Short-weighing the customer after obtaining an original weighing is something that the ordinance complained of does not purport to prevent.* (See Appellee's Brief, pp. 29-31). That is covered by other sections of the ordinance.

The further suggestion that in slushy weather the tare weight of the truck would vary because of the ice picked up on the running gear is equally untenable. The gross

weighing in Chicago should normally show a higher gross weight under such conditions than that shown on the mine scales. If a dishonest driver attempts to estimate the amount of this over-weighing and could accurately do so, he could possibly abstract approximately a dollar's worth of coal from a five-ton load without detection. But he could do the same thing in driving over the slushy streets in the City of Chicago because, as pointed out, there are over three thousand miles of streets in which he could pick up a load of slush on his running gear. Furthermore, it is inconceivable that a driver would run the risk of a $200 penalty and take the burden of unloading 500 pounds of coal for the possibility of obtaining a dollar's worth of coal by short-weight. We submit, therefore, that there is no suggestion made as to a method of short-weighing which is not equally applicable to the method of weighing required by the present ordinance.

The answer made to our second suggestion—of permitting the tare weight of the truck to be obtained *after delivery of the coal*—is equally false and misleading. Let us analyze the illustration given by appellee at page 24 of its brief. Counsel assume the tare weight of a truck and equipment at the scales at 9,000 pounds and that it contains 9,000 pounds of coal. This gives a gross weight of 18,000 pounds, which would be shown on the weighing in Chicago. The trucker then drives away, delivers his coal and returns to the scale for weighing of his tare weight. Now, if he is honest, his weight will be correct, except for the possible variation of one per cent which the law allows.

The appellee's elaborate argument is perverted by its determined but unjust assumption that (a) the dealer, (b) the truck-driver, and (c) the bonded weighmaster are all to be dishonest.

Appellee's argument further assumes that the present ordinance requires—which it does not—that the public weighmaster of a local dealer keep the driver under constant surveillance from the time the driver weighs his empty truck until the gross and net weights are obtained. It also further assumes that the non-resident truck-driver will be equipped with elaborate means of varying the tare weight of his truck which would be less easily discoverable than similar devices stored inside a local coal yard—an assumption which is sharply in conflict with logic.

Appellee says that the non-resident truck-driver can take off two spare tires (200 pounds), tow chains (80 pounds), sideboards (350 pounds), dividing boards (300 pounds), and can consume ten gallons of gasoline (80 pounds), or a total weight of 1010 pounds, before returning to the scales for a check of the tare weight. After all this effort the trucker has short-weighted his customer, on counsel's figures, $2.00 worth of coal. The ten gallons of gasoline he has to dispose of are worth approximately $1.50 and he has to find a place to hide his tow chains and his sideboards and spare tires in the process. All of this must be done out on the streets in Chicago, and since the trucker delivers coal all over the city it would assume a number of hide-outs for storing this equipment in the city while the trucker returns to the scale for a check of his tare weight.

Let us assume that this same dishonest driver wanted to pursue this scheme while working for a Chicago coal yard and wished to obtain a public weighmaster's certificate, as called for by this ordinance, before delivering his coal. He can obtain his own yard if he gets a scale and can be licensed as a public weighmaster and do the weighing himself. There are no inspectors present in his own yard. He weighs his tare weight without the two spare tires (200 pounds), without the tow chains (80 pounds), without the

sideboards (350 pounds), without the dividing boards (300 pounds), and has his gas tank practically empty. His tare weight would show 7990 pounds. He then drives to the gasoline pump and fills up with gasoline (80 pounds), puts on his two spare tires (200 pounds), his tow chains (80 pounds), his sideboards (350 pounds), and his dividing boards (300 pounds). He then puts on 9,000 pounds of coal and returns to the scale for a gross weighing and gets a figure of 18,000 pounds. The tare weight subtracted from the gross weight gives him a net weight of 10,010 pounds, and his *public weighmaster's certificate,* in accordance with the ordinance, will show a delivery of five tons of coal, whereas the purchaser in fact will receive only four and a half tons. All of this process of short-weighting is done within the secrecy of his own coal yard and is obviously more easily accomplished than the method of short-weighting suggested by counsel, which must take place openly on the city streets of Chicago. The City further says that the protection afforded a customer by this ordinance is that the short-weighting will not take place in the yard because the weighmaster is bonded in the amount of $2,000 and has his good will to customers to consider. Of course, the good will to customers is common no matter who is in the business and the matter of posting a $2,000 bond has never been objected to by the appellant, if the ordinance would permit a method of weighing which would obviate the burdensome and unnecessary charge in handling and dumping the coal. If the appellant owned a coal yard and had posted a bond he would still have had to dump coal in his own yard after trucking it from the mine in order to obtain the tare weight, or weight of the empty vehicle, before unloading his coal on the premises of his customer. This requirement of ascertaining the tare weight first is the vice of this ordinance.

It is apparent that the City's argument and illustration are an attempt to lead the Court away from the true issue, which is that the onerous method of weighing required by the ordinance is unnecessary to prevent short-weighting and is unreasonable in that it imposes an extra charge for rehandling the coal which is out of all proportion to any possible benefit gained by the consumer. After the laborious working out of figures not substantiated by the record, the appellee has made out a hypothetical case of short-weighting that would result in a quarter-ton shortage, which would result at the most in a half-ton shortage in a five-ton load and a loss of $2.00 on a five-ton load to the consumer defrauded. The cost to the consumer of reweighing this coal in each and every instance, whether delivered by a dishonest driver or an honest driver, is from 50c to $1.00 a ton, or from $2.50 to $5.00 on the average load. The question asked by this appellant is whether or not it is reasonable for the City of Chicago to impose this charge on a consumer on the hypothetical theory advanced here, when the same method of short-weighting can be carried on by a dishonest coal dealer or trucker while yet obtaining a weightmaster's certificate as required by the present ordinance.

As pointed out by this Court in the case of *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, at page 429:

> "But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

All that appellee's figures prove in the instant case is that there is a greatly disproportionate detriment to the buying public in the application of this ordinance to the

business involved with no corresponding benefit to the consumer. By their own figures counsel have proved that the ordinance is exacting a toll from the consumer of from $2.50 to $5.00 for *every* average load under the theory that the consumer should be protected from the *occasional* case of dishonesty which might involve a cost to the consumer at the most of $2.00 on the same load of coal. As we pointed out in our original brief, the interest of the consumer is in his pocketbook and since he must pay a charge of this kind for protection against a practice which is equally possible under the present ordinance the unreasonable nature of the regulation is obvious and apparent.

The cases cited by the appellee from pages 26 to 33 have no application to a situation such as is presented here, and an examination of the language used in them shows in each and every instance that the reasonableness of an exercise of the police power is always open to the scrutiny of the courts. If this were not so no case could ever be brought to this Court to review whether or not a state has transgressed the constitutional prohibition invoked by this appellant.

We do not comment in detail on the twenty-four cases cited by appellee under Point II because the *general rule* upon which we rely is well established by the cases on page 17 of our original brief and the cases cited by appellee under Point II are not helpful in determining the validity of the *particular ordinance* involved here.

On page 33, the appellee quotes Mr. Justice Herrick of the Supreme Court of Illinois to the effect that:

> "The circumstance that has brought about the controversy here is, after all, one of transportation."

This change in transportation referred to has arisen since the passage of the ordinance, and while an ordinance may

be reasonable and therefore valid at one time or under one set of circumstances, it may be unreasonable and therefore invalid under different circumstances. A statute may be perfectly valid on its face, yet under a given state of facts disclosed by evidence be invalid. While the fundamental principles of the organic law of the nation remain unchanged, their application to changing conditions must and does call for a restatement of ancient and obsolete rules.

Snyder v. *Massachusetts,* 291 U. S. 97.
Funk v. *United States,* 290 U. S. 371.

The rule upon which we rely is clearly stated in the case of *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405 (at page 415):

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

III.

The Cases Cited by Appellee Support Our Contention That the Ordinance Violates the Fourteenth Amendment.

We agree with appellee's brief (pp. 33-34) that the sole question before this Court is whether the ordinance here involved violates Section 1 of the Fourteenth Amendment in denying to appellant the equal protection of the laws or in depriving him of liberty or property without due process of law.

We also agree that if the ordinance is a legitimate use of legislative power it is not unconstitutional.

We contend that the ordinance is so *plainly* and *unnecessarily* burdensome that it is unconstitutional. We shall show that while no other case has passed on the requirement involved here the inferences to be drawn from the very cases cited by appellee under its Point III prove that the requirement here is invalid and that the very absence in 125 years' of American cases on the regulation of weights and measures of cases dealing with such a harsh requirement indicates strongly that imposing the harsh requirement of the present ordinance has never before been attempted. This very lack of cases is persuasive of the unreasonableness of the requirement.

Appellee cites thirty-five cases on pages 33 to 47 of its brief. Not one holds to be reasonable a requirement that a loaded vehicle being weighed by a public weigher must be unloaded and reloaded at the scales before being unloaded at the purchaser's premises. In the present ordinance that requirement is imposed with respect to coal coming from the mines by truck through the device of requiring a weight certificate of an official weighmaster (in addition to the dealer's delivery ticket) to be delivered to the purchaser *before the load is unloaded on the purchaser's premises* and of then refusing to permit a weighmaster to certify the tare weight of the truck except by weighing it empty shortly before weighing it full.

The cases decided by this Honorable Court on pages 35 to 38 of the appellee's brief do not concern requirements such as that involved in the case at bar, and while some of them deal with the general subject of the regulation of weights and measures (which we have always conceded is a proper subject for reasonable regulation under the police power), the most that can be said for them is that they state well established general rules of constitutional law which really require no such extended citation of au-

thority because we have not disputed the existence of such rules.

However, we call attention to certain quotations in the cases which seem to us to be contrary to the contention of the appellee to the effect that the reasonableness of the ordinance is not subject to judicial review.

In *McLean* v. *Arkansas,* 211 U. S. 539, this Court said (p. 547):

> "It is also true that the police power of the state is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution."

In *House* v. *Mayes,* 219 U. S. 270, the Court said (p. 282) that the means by which the police power of a state is exercised shall be devised by the state, "taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States."

The statute in *Pittsburg & S. Coal Co.* v. *Louisiana,* 156 U. S. 590 (cited on page 36), enforced a system of gauging coal equally applicable to all coal coming by boat although it made no such regulation of coal coming by land. This Court held that there were differences in transportation by boat and by land which justified regulating one and not the other. In our case, we are asking for a different regulation of coal coming into Chicago by truck direct to the consumer than is applied to coal coming by railroad to a local coal dealer and thence to the consumer by truck. The right and duty of the City of Chicago to recognize

inherent differences in situation caused by differences in methods of transportation are clearly shown by the case cited, which case clearly rebuts the holding of the court below to the effect that recognizing such inherent differences would be discriminating *in favor of the appellant.*

While ordinarily the complaint that legislation is discriminatory so as to deny equal protection of the law is directed against a statute which recognizes differences in the objects of the regulation and regulates them with varying provisions, the complaint here is largely the converse, namely, that the City of Chicago is attempting to apply the same requirements to two radically different methods of doing business. The *Pittsburg Coal Co.* case just referred to is ample justification for a recognition by the City in regulating the coal business that the method of transportation is an important factor in determining the reasonableness of a regulation. As we have already pointed out, a regulation reasonable as to one set of facts may become unreasonable where because of economic changes (in this case the coming of truck transportation due primarily to the building of hard roads) a new set of facts comes into being.

On page 38 of appellee's brief it is stated that

> "Statutes and ordinances *such as the one before the Court* which seek to protect buyers by requiring that certain commodities be weighed upon public (or licensed) scales, by public (or licensed) weighers, are common and have regularly and generally been upheld as valid police regulations." (Italics ours.)

This assertion we emphatically dispute. The earliest ordinance referred to in the digest of cases contained in appellee's brief (pp. 38-48) was passed in 1810 (*Charleston v. Rogers,* 2 McCord 495, 13 S. Car. L. Rep. 293). An

examination of the statutes and ordinances attacked in the one hundred twenty-five years since 1810 discloses not a single ordinance or statute the effect of which was to require coal coming into the city loaded in a vehicle to be unloaded in order to be weighed, before delivery to the purchaser. Such a procedure is so repugnant to elementary ideas of justice that the very absence of cases dealing with the requirement such as the City of Chicago seeks to enforce in the present case is itself strong evidence that no such requirement has ever before been attempted.

Most of the authorities cited by the appellee are irrelevant. It is plain that the citation of these irrelevant authorities is intended to obscure the real issue—whether the requirement involved here is a *reasonable* one. Instead of arguing that the requirement is reasonable, the appellee takes the indefensible position that this Court cannot inquire into the reasonableness of the ordinance because, forsooth, the regulation of weights and measures is in the exercise of the police power. Appellee's own cited cases are contrary to that assertion.

We have read with care the numerous authorities cited on pages 38 to 48 of appellee's brief. Many of them are obviously irrelevant on the face of appellee's brief. Several, moreover, are distinctly favorable to the appellant. Before we point out the authorities cited by the City which are affirmatively helpful to the appellant's cause, we state without fear of successful challenge that not a single one of the authorities referred to at such length by the appellee dealt with any requirement such as the City of Chicago seeks to impose by ordinance in this case. Rather, the authorities cited by the appellee go clearly to the point that while the regulation of weights and measures falls within the appellee's general powers, the regulations must be *reasonable.*

On page 38 appellee cites Dillon on Municipal Corporations (5th ed.), Sec. 710. We refer the Court to the preceding section, Section 709, which in the earlier editions of this treatise was Section 390, frequently referred to in the cases cited by the appellee. Section 709 says:

> "Laws requiring articles to be inspected or weighed and measured before being sold are in the nature of police regulations, and are valid in the absence of special constitutional provisions. *When reasonable in their nature,* they are not regarded as being in restraint of trade." (Italics ours.)

We now proceed to the cases cited.

In *Taylor* v. *Pine Bluff*, 34 Ark. 603, the court declared void an ordinance requiring the weighing of cotton on a city scale for a fee of twenty-five cents per bale on the ground that the ordinance was intended to produce revenue. No contention was made or passed upon in that case respecting the reasonableness of the method required by the ordinance of ascertaining the weights. The court said, in part (pp. 608-609):

> "The court did not err in holding that the city had power to pass, and enforce by proper penalties, an ordinance of this nature. But, *being a police regulation, it must not be unreasonable* nor directed to the end of raising a revenue. Of course, the city council must first judge of what may be reasonable, and what fees will fairly compensate for the costs and expenses of the system, without regard to revenue. The courts will respect any fair exercise of this discretion, and will not be nice to take new accounts of expenses and correct small excesses. But the police power is too vague, indeterminate and dangerous to be left without control, and *the courts have ever interfered to cor-*

rect an unreasonable exercise or mistaken application of it." (Italics ours.)

In that case the lower court had undertaken to restrain the collection of that portion of the fee in excess of fifteen cents and the Supreme Court of Arkansas held that to be erroneous and itself declared the ordinance void without prejudice to the right of the city "to pass reasonable ordinances to provide for the weighing of cotton, or other things offered for sale; and to make the same compulsory with the payment of a reasonable fee" (pp. 609-610). A similar order should be entered in the present case, leaving the City of Chicago free to enact a reasonable ordinance covering the verification of mine weights of coal coming by truck into the City of Chicago. The portion of the opinion just quoted emphasizes the fact that the issue in the present case is not one between the present ordinance and the absence of all regulation, but is one between the present ordinance and some reasonable ordinance which the City of Chicago has the power to enact.

Wills v. *City of Fort Smith*, 70 Ark. 221, 66 S. W. 922, cited on page 39 of appellee's brief, was a case in which two of the five judges of the Arkansas Supreme Court dissented (p. 225) "on the ground that the ordinance in question is unreasonable and oppressive, and therefore void." It is noteworthy that the majority *considered and decided the reasonableness of the ordinance.* The attack there made on the ordinance was the fact that the official scale operated during the summer months, when little coal was sold, was ten blocks from the plaintiff's yard. The court held (by a three to two vote) that since during the winter months, when much coal was sold, the city operated two scales, one of which was near the plaintiff's yard, the ordinance was not unreasonable. There is not the slight-

est intimation in the opinion that it was necessary for the dealer in order to comply with the ordinance to unload his wagon at the city scale *before making the delivery to the purchaser.* In fact, it is apparent from a reading of the majority opinion that in order to comply with the ordinance it was not necessary for the dealer to unload his wagon at the city scale in order to ascertain the tare weight of the vehicle. Surely any such an extravagant requirement (as exists in our case) would have been denounced by the appellant in that case had it been required by the ordinance there involved. Two of the five judges held that mere distance of the city scales from the coal yard during the off-season was sufficient to condemn that ordinance as unreasonable. Surely had the dealer been required, in addition, to unload his coal each time at the city scales in order to comply with the city ordinance, the majority of the court would have held it to be unreasonable. In no view of the case does it tend to prove reasonable the Chicago ordinance which is involved in this case.

Petty v. *State,* 102 Ark. 170, 143 S. W. 1067, did not concern the reasonableness of the statute there involved nor did the case treat of methods of weighing cotton, which was the commodity there involved.

The two California cases cited on page 39 of appellee's brief have nothing whatever to do with the issue in the present case. They involved the right of city weight inspectors to receive salaries and the ordinances involved in those cases did not refer in any manner to public weigh-masters, but referred only to inspectors of weights and measures. We are at a loss to understand why they should be cited in the present case.

In *City of Cartersville* v. *McGinnis,* 142 Ga. 71, 82 S. E. 487, the court held an entire ordinance unconstitutional be-

cause Section 7 of the ordinance provided as follows (pp. 73-74):

> "It shall be the duty of the public weigher to determine all questions of tare or reduction from gross weights of any article weighed according to the custom of the trade, or as conditions necessary to fairness and justice require; and his decision shall be considered the fair and correct reduction. And, in all weighing, to furnish a certificate of tare, gross, and net weight thereof."

The court held that this section deprived the plaintiffs of property without due process of law and that for that reason the entire ordinance was unconstitutional. The question involved in our case was not raised in that proceeding, but it is significant that Section 7 itself related to the ascertainment of tare weights, which gives rise to the present controversy, and that the method of ascertaining tare weights provided by that ordinance was held unreasonable.

The ordinance involved in *Austin* v. *Atlanta*, 28 Ga. App. 702, 113 S. E. 113, permitted weighing "upon accurate scales of such dealer or of the party from whom he purchased or the official city scales, and certificate of such weight shall be delivered by said dealer to the purchaser." The defendant, in violation of the ordinance, estimated the weight of coal to be delivered to one of his purchasers without weighing it and was 1516 pounds short on a two-ton order. The court held that an ordinance requiring coal sold by weight to be weighed on a scale was valid—a proposition which is not an issue in the present case—but it did not deal with the question of the reasonableness of any provision approaching even remotely the drastic provision in the ordinance now under review.

The holding in *Davis* v. *Town of Anita*, 73 Iowa 325, 35 N. W. 244, is distinctly favorable to the appellant. In that case the ordinance provided that it should be unlawful to sell any commodity sold by weight within the Town of Anita when the quantity of the article exceeds one thousand pounds "without procuring a draft of such article or commodity to be made upon the city scales." The reasonableness of the method of ascertaining a tare weight was not there involved. But the language of the court, per Mr. Justice Seevers, is significant and helpful to the appellant here. The court said (p. 326):

> "This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation; *subject, however, to the general rule that the ordinance must be reasonable.* The power given, in substance, is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred. The privilege conferred should not be confined within narrow bounds, but the discretion reposed in the corporation must be fairly exercised, so as to not unduly infringe upon the rights of the citizen, on the one hand, and yet, on the other, so that the express and necessarily implied object of the statute shall not be unduly limited." (Italics ours.)

And on page 327, the court said, "*It is conceded that the ordinance must be reasonable*", citing Dillon on Municipal Corporations (apparently the first edition), Section 319. In so far as the case has any relevancy here, it is authority for the proposition that this Court has the power to inquire into the reasonableness of the method sought to be imposed by the City of Chicago for the ascertainment of the tare

weight of the vehicle in which coal is brought into the City of Chicago for direct sale to one of its residents.

State v. *Smith,* 123 Ia. 654, 96 N. W. 899, did not involve any question of the reasonableness of a method of ascertaining the weight and there is no indication in the opinion of the court that the hay, straw, oats or corn required by the ordinance there involved to be weighed on city scales would have to be unloaded before delivery to the purchaser in order to determine the tare weight of the vehicle in which they were brought in to the city.

Collins v. *City of Louisville,* 41 Ky. Rep. (2 B. Mon.) 134, held invalid a fee ostensibly levied for the measurement of "stone coal". The court held that the fee was in reality a tax and invalid. It is interesting to notice that the court said (p. 135):

> "The ordinances provide for the measuring of carts by the city measurer, and the stamping of said measurement and the contents thereon, at the expense of the owner. It is declared to be unlawful for any person to haul lime or coal from the wharf without first having his cart or carts measured, and a penalty is denounced for a violation of this inhibition, etc. And an ordinance of 1832, still in force, ordains that the seller of lime and coal, sold at the city wharf, shall pay a tax on the same of one half cent for each bushel so sold, which would seem to include that sold in the boat by wholesale, as well as on that sold by retail."

The case has no relevancy to the question now before the Court, but the ordinance itself is an early, interesting indication of a reasonable method of determining the capacity of a vehicle.

In *Vega S. S. Co.* v. *Consolidated Elevator Co.,* 75 Minn. 308, 77 N. W. 973, the question here involved was not de-

cided. That case involved the weighing of grain at an elevator and the court held that the attempt to make the public weighmaster's certificate of weight conclusive is (p. 312) "the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights" and is unconstitutional.

In *State ex rel. Stone* v. *Eck,* 121 Minn. 202, 141 N. W. 106, the ordinance, as an alternative to requiring the commodities sold to be weighed by a public weighmaster, provided that nothing in the ordinance should prevent the parties from accepting the weight of the buyer if he were the owner of a scale and the seller was satisfied with the weight so ascertained. There was no provision in the ordinance there involved for the delivery of a certificate of net weight before the commodity was removed from the vehicle at the premises of the purchaser, so that the decision is not pertinent to a determination whether the Chicago ordinance here involved is a reasonable one. Nevertheless, the court did consider the reasonableness of the ordinance and it is clear from the opinion that coal sold in the City of Crookston did not have to be unloaded at the city scale in order to comply with the ordinance. The court said (p. 205):

> "This [ordinance], so far as the record discloses, imposes no hardship upon the fuel dealers of Crookston. Presumably the public scales are centrally located and readily accessible to all dealers. There is no showing to the contrary, even if it be conceded that inconvenience in this respect would be a potent factor in determining the reasonableness of the ordinance."

In *Gaines* v. *Coates,* 51 Miss. 335, the question involved in the present case was not discussed.

In *Sylvester Coal Co.* v. *City of St. Louis,* 130 Mo. 323,

32 S. W. 649, the ordinance provided that a dealer could be "a bonded weigher" and the only attack made on the ordinance there involved was that the city charged too much for the form of certificates furnished by it to such bonded weighers for the purpose of issuing certificates complying with the ordinance. The sole complaint made by the plaintiffs was that the charge for the certificates was an illegal tax. The reasonableness of the method of ascertaining the weights was not involved. That the question now before the Court was not determined by the Supreme Court of Missouri is clear from the following quotation from the opinion in that case (p. 321):

> "It [the ordinance] is to protect the citizen from being imposed upon by false weights and measures. To accomplish this purpose, while dealers in coal may weigh the coal which they sell on their own scales, they are not permitted to sell a wagon load of coal that has not been weighed by a weigher approved by the mayor and authorized by law to weigh the same."

In *City of St. Charles* v. *Elsner*, 155 Mo. 671, 56 S. W. 291, the ordinance prohibited a sale unless the load was weighed. The ordinance did not require the wagon to be unloaded prior to delivery to the purchaser. The appellant's contention was that the weigher's fee was a tax and that exempting transactions involving less than certain quantities was an illegal discrimination. The question involved in the present case was not decided.

In *State ex rel. Barker* v. *Merchants Exchange*, 269 Mo. 346, 190 S. W. 903, affirmed 248 U. S. 365, a statute prohibited private individuals and corporations from issuing weight certificates "of grain weighed at any warehouse or elevator in this State where duly appointed and qualified State weighers are stationed and in control of the scales

under the provisions of this article." The statute also prohibited the making of charges for any such weighing or for any such weight certificate. The method of weighing was not complained of as unreasonable and the question involved in the present case was not decided.

In *City of Lamar* v. *Weidman,* 57 Mo. App. 507, the court held that the subject of the ordinance (weights and measures) was clearly within the statutory power of the city but that a more difficult question was whether a section of the ordinance prohibiting others than the public weigher from charging a fee for weighing was unreasonable. The court held that such section was invalid, saying (p. 512):

> "The grounds upon which an ordinance may be declared void for unreasonableness have been repeatedly held to be where it is oppressive, unequal, unjust or altogether unreasonable."

Stokes & Gilbert v. *City of New York,* 14 Wend. 87, is an early case sustaining the validity of a city ordinance requiring coal to be sold by weight. The case did not decide whether any particular method of weighing the coal was unreasonable.

City of Raleigh v. *Sorrell,* 46 N. C. 49, is favorable to the appellant. The ordinance in that case provided (p. 50):

> "That all fodder, oats, hay and other provender sold in this market shall be weighed at the public scales, and the weigh-master shall give a certificate of the weight of the load, *and also of the cart or wagon when unloaded.*" (Italics ours.)

This clearly indicates that the wagon was to be weighed *after delivery* of the provender to the purchaser so that

the wagon did not need to be first unloaded at the city scale in order to comply with the ordinance. No complaint was made as to the method of weighing and the court held that the ordinance abridged no right of the defendant because selling his oats by weight he would have to have them weighed and it was a convenience to him to have them weighed in bulk by the city.

City of Cincinnati v. *Broadwell,* 3 Ohio Dec. Repr. 286, held that the city had no power to prohibit persons other than the city weigher from following "the business of weighing." The reasonableness of the ordinance there involved was not otherwise decided.

Taylor v. *Anderson,* 40 Okla. 316, 137 Pac. 1183, was a controversy between a county weigher and a municipal weighmaster as to whether the municipality had a right to create the office of municipal weighmaster. The court concluded (p. 205) that Oklahoma City might maintain a municipal scales in charge of a public weighmaster, but the case did not decide any question of the reasonableness of an ordinance regulating weights and measures.

O'Maley v. *Borough of Freeport,* 96 Pa. 24, was a bill in equity against the Borough to restrain the enforcement of an ordinance requiring the weighing of coal and the payment of five cents for each load delivered in the Borough. The trial court said in an opinion quoted with approval by the Supreme Court of Pennsylvania (p. 27):

> "The law, as gathered from all authorities, fixes as one of the essential qualities of a valid ordinance that it must be reasonable."

The Supreme Court of Pennsylvania held (p. 30):

> "The only limitation of this power is, that it must be exercised in a reasonable, lawful and constitutional manner."

That case clearly sustains the right of the court to determine the reasonableness of an ordinance.

In *Charleston* v. *Rogers,* 13 S. Car. L. Rep. 293, 2 McCord, 495, the only question was whether an ordinance requiring coal, including coal imported from Great Britain, to "be measured in a certain manner by the inspector of the city, at the expense of twenty-five cents a ton, to be paid to the inspector by the seller," was the imposition of an impost or duty on imports in violation of Section 10 of Article I of the Federal constitution. The reasonableness of the ordinance was not in issue; in fact, the method of measuring the coal was not even indicated by the opinion. The other South Carolina cases and the Texas cases cited on page 46 of appellee's brief are equally irrelevant.

Yates v. *City of Milwaukee,* 12 Wis. 673, sustained the power of the city to enact an ordinance requiring that a load of hay be weighed upon a city scale before being offered for sale. The method of weighing was not objected to and it does not appear from the opinion of the court that the hay would have to be unloaded in order to be weighed. Certainly, the method of ascertaining the tare weight of the vehicle was not the drastic method imposed by the ordinance involved in the present proceeding or complaint would have been made of it.

Brittingham v. *City of Sparta,* 157 Wis. 345, 147 N. W. 635, is helpful to the appellant. That case was an injunction suit to restrain the enforcement of a city ordinance, and the court held that if the ordinance were valid *in any particular* the bill would not lie. The ordinance was as follows (p. 347):

> "All coal offered for sale and delivered within the limits of the city of *Sparta,* except in carload lots, shall first be weighed at the public city scales of the city

of *Sparta* by the weighmaster, and such weighmaster shall give to the owner thereof a written ticket with his signature attached thereto of the quantity of coal contained in such load *upon the return of such wagon unloaded and weighed.*" (Italics ours.)

Thus it will be noticed that the terms of the ordinance were *entirely different* than those of the ordinance involved here. Express provision was made for weighing the empty vehicle *after delivery* of its load to the purchaser, whereas the vice of the ordinance of the City of Chicago here complained of is the requirement that the coal be unloaded at the scale in order to obtain the tare weigh of the vehicle *before the coal is delivered to the purchaser.* One of the objections made to the Sparta ordinance was that the plaintiff sold a large quantity of coal to farmers and others living outside of the city to whom delivery was made at the yard and that in order to comply with the ordinance such coal must be loaded on one of the plaintiff's wagons, hauled to the city scales and weighed, and then unloaded and reloaded on the purchaser's vehicle and the plaintiff's empty wagon weighed. In passing on this objection the Supreme Court of Wisconsin clearly indicated its belief that if the ordinance were thus construed it was invalid. The court said (p. 354):

"If the ordinance applies to sales made for consumption outside of the city, where delivery is made at the plaintiff's coal yard, it may be that it is unreasonably burdensome as applied to such sales. The plaintiff and other coal dealers in *Sparta* may come in competition with dealers in other places in making sales to farmers and others using coal some distance from the city. If the extra expense entailed by the ordinance is as great as is claimed, it might well prevent the *Sparta* dealers from meeting the prices made

by other dealers who are not handicapped by such a regulation. We are not at all certain, however, that the ordinance was intended to apply to cases where delivery is made to the purchaser at the coal yard and where the latter has the opportunity to observe the weighing of the coal which he buys. We do not decide the point, but hold that if the ordinance is invalid as to such sales it may still be held good as to sales made for consumption within the city and where the dealer hauls the coal sold from its yard and delivers it on the premises of the consumer."

The court further said (p. 354):

"They [dealers] are not obliged to suspend their business or to change their methods of carrying it on further than to weigh the coal sold by them in the manner provided if they are afforded the opportunity to do so when they make their deliveries."

Contrary to the statement on page 47 of appellee's brief, the Wisconsin court did *not* overrule the objections made to the ordinance but simply held that *in some particulars* the ordinance was valid and that therefore its enforcement would not be wholly enjoined. The court said (p. 352):

"Any objection that does not go to the validity of the entire ordinance need not and in fact should not be considered in a suit of this character."

The language quoted above from this opinion clearly indicates that instead of holding reasonable the provisions of the ordinance which would have required the rehandling of coal to non-residents, the court criticized such provisions and refused to hold them reasonable.

Miller v. *Town of Virden*, 16 Man. 479, did not involve the question of reasonableness of the ordinance on weights

and measures, and is therefore not applicable here. Since the 14th Amendment is not in force in Manitoba it is difficult to perceive how the case can be of any assistance in deciding the present appeal.

Pages 48 to 58 of appellee's brief undertake to answer our original brief and we have no further specific comment to make except with respect to pages 50 and 51 of the appellee's brief, where it refers to our contention that a non-resident shipping coal from the mine is discriminated against in being refused a license as a public weighmaster at the point of original loading. This is a privilege granted to a Chicago coal dealer and enables him to comply with the ordinance without any burden other than giving a $2,000 bond, which is reasonable when applied either to him or to a non-resident. On page 51 appellee states that the proper inference to be drawn from appellee's refusal to license public weighmasters at Morris, Illinois, is that the City could not supervise the activities of non-resident weighers outside of the City. We call attention to the fact that this contention is entirely inconsistent with the appellee's concession on page 18 of its brief that the method of protection provided in the ordinance is regulation by a system of licensing. With that concession we agree. The local coal dealer is himself licensed and gives bond as a public weighmaster and then weighs his coal in his own yard under a weighing procedure which for him is not varied one whit by the ordinance from what it would be in the absence of the ordinance. Why, then, not give licenses as public weighmasters—secured by the same sort of bonds—to non-residents owning scales outside of the City of Chicago so that they, too, may comply with the ordinance requiring a public weighmaster's certificate for each load without the burden—which is not imposed on the local dealer—of unloading the coal inside of the city to verify

the weight? If an equal burden is to be imposed upon resident and non-resident, each should be given equal means wherewith to satisfy the burden.

This is particularly pertinent and persuasive because on pages 29 to 31, the appellee concedes that the purpose of the weighmaster's ordinance is to assure a correct *original* weighing and that the additional sections of the Chicago ordinances cited by us on page 21 of our original brief are for the purpose of discovering short weight *after* the giving of the weighmaster's certificate. There being those sections for that purpose, no reason is perceived why the official obligation of a non-resident weighmaster to certify correct original weights might not be as well enforced by a license and bond as in the case of resident weighmasters. Since the system is admittedly a "licensing system" depending for its effectiveness on the giving of a bond and since such bond would be effective irrespective of distance, no sufficient justification has been shown for denying to non-residents the same right to qualify as public weighmasters as is granted to residents.

This discrimination is a denial of equal protection of the laws.

If it be held that the City rightfully refuses to license non-residents as weighmasters, then, viewing the effect on them of the ordinance requiring them to furnish public weighmasters' certificates without the reasonable means of complying with the ordinance, this Court should declare the ordinance unreasonable and oppressive as applied to the business of shipping coal from mine to consumer.

The appellee will then be at liberty to regulate such business by passing a reasonable ordinance which takes into account the inherent differences between the operation of a local coal yard and the operation of the business of

shipping coal from mine to consumer, so as to eliminate the unreasonable requirement that coal shipped by the latter method must be unloaded at scales inside the City of Chicago in order to comply with the weight ordinance.

We respectfully submit that the judgments of the Municipal Court of Chicago and of the Supreme Court of Illinois should be reversed at the cost of the appellee.

Respectfully submitted,

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
OWEN RALL,
Counsel for Appellant.

Chicago, Illinois,
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